

117353

DECISION



20626

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

Memorandum

FILE: B-204119

DATE: January 27, 1982

MATTER OF: Lieutenant Colonel Robert C. McFarlane,
USMC (Retired)

- DIGEST: 1. The reduction of military retired pay required under the dual compensation restriction imposed by 5 U.S.C. § 5532(c) involves a determination of the amount by which the combined rate of retired pay plus Federal civilian salary exceeds the rate of basic pay prescribed for level V of the Executive Schedule. The retired pay is reduced by that amount, subject to a proviso that the remainder must at least be equal to the cost of the retiree's participation in any survivor's benefits program or veterans insurance program.
2. 5 U.S.C. § 5532(c) requires that combined military retired pay plus Federal civilian salary not exceed the rate of pay for level V of the Executive Schedule for any "pay period." Hence, the amount of the retired pay reduction required for any given pay period may not be refunded to a retiree even though the retiree's combined retired pay and civilian salary for the entire year may be less than the annual pay prescribed for level V of the Executive Schedule.

The Head, Disbursing Branch, Fiscal Division, United States Marine Corps, has requested our decision on the proper computation of the retired pay reduction required by 5 U.S.C. § 5532(c). The request was assigned Control No. DO-MC-1368 by the Department of Defense Military Pay and Allowance Committee.

The issues stem from Lieutenant Colonel Robert C. McFarlane's retirement from active military service with the Marine Corps on July 1, 1979, and his subsequent appointment to a full-time civilian position with the United States Senate on July 2, 1979. Although he has since changed employment, Colonel McFarlane has, at all times since his military retirement, been employed full time in civilian positions with the Government.

Colonel McFarlane's retired pay was reduced pursuant to 5 U.S.C. § 5532(b) as of July 2, 1979. The two questions presented here involve the proper method of computing the further reductions required by 5 U.S.C. § 5532(c), which provides:

"(c)(1) If any member or former member of a uniformed service is receiving retired or retainer pay and is employed in a position the annual rate of basic pay for which, when combined with the member's annual rate of retired or retainer pay (reduced as provided under subsection (b) of this section), exceeds the rate of basic pay then currently paid for level V of the Executive Schedule, such member's retired or retainer pay shall be reduced by an amount computed under paragraph (2) of this subsection. The amounts of the reductions shall be deposited to the general fund of the Treasury of the United States.

"(2) The amount of each reduction under paragraph (1) of this subsection allocable for any pay period in connection with employment in a position shall be equal to the retired or retainer pay allocable to the pay period (reduced as provided under subsection (b) of this section), except that the amount of the reduction may not result in--

"(A) the amount of retired or retainer pay allocable to the pay period after being reduced, when combined with the basic pay for the employment during the pay period, being at a rate less than the rate of basic pay then currently paid for level V of the Executive Schedule; or

"(B) the amount of retired pay or retainer pay being reduced to an amount less than the amount deducted

from the retired or retainer pay as a result of participation in any survivor's benefits in connection with the retired or retainer pay or veterans insurance programs."

The first question presented in the submission concerns the proper interpretation of 5 U.S.C. § 5532(c)(2)(B). It is suggested that subparagraph 5532(c)(2)(B) may allow alternate methods of computing the retired pay reduction. Under the method now being used, the cost of participation in a survivor's benefits program or a veterans insurance program is not considered in computing the required reduction, unless the remainder is inadequate to cover that cost. Under the alternate method suggested, the cost of participating in those programs would be subtracted from retired pay before computing the amount by which the retired pay combined with the civilian salary exceeds level V of the Executive Schedule. It is questioned whether the use of that alternate method is permissible in Colonel McFarlane's case, since it would be more beneficial to him.

In our view, the statute is clear on its face and is capable of only one interpretation. Subparagraph 5532(c)(2)(B) simply requires that, when reducing retired pay by the amount the retired pay combined with civilian salary exceeds level V of the Executive Schedule, the retired pay remaining will at least be equal to the cost of participating in a survivor's benefits program or veterans insurance program. This provision ensures that the retiree will not incur any out-of-pocket costs to participate in those programs and will always be entitled to at least as much retired pay as is necessary to cover participation in the programs. However, subparagraph 5532(c)(2)(B) only precludes retired pay from "being reduced to an amount less" than the cost of participating in the programs, and it does not otherwise authorize that cost to be taken into account. It is therefore our view that in computing the retired pay reduction required by 5 U.S.C. § 5532(c), the cost of participating in survivor's benefits or veterans insurance programs is to be considered only if that cost is not covered by the retired

pay remaining after being reduced in the amount by which the total combined salary and retired pay exceeds level V of the Executive Schedule. Thus, we conclude that the method currently being used to compute the retired pay reduction is correct, and the alternate method suggested is impermissible.

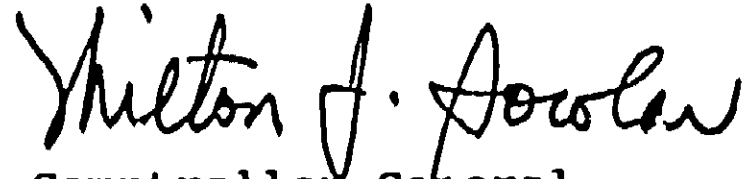
The second question presented is whether retroactive payments of retired pay may be made at the end of a year to Colonel McFarlane if his combined civilian salary and retired pay for the entire year does not exceed the annual pay prescribed for level V of the Executive Schedule. The question arises because of Comptroller General decisions which were issued under the dual compensation provisions of section 212 of the Economy Act of 1932, as amended, 5 U.S.C. § 59a (1958 ed.), which provided for a maximum rate of retired pay plus civilian salary of \$10,000 per year. We held that under the specific terms of that particular statute, a retired officer was entitled to the amount of retired pay withheld from him during a calendar year if the total amount received for that entire year as compensation as a Government civilian employee and retired pay as an officer was less than \$10,000. See 42 Comp. Gen. 71 and 229 (1962). That statute was, however, repealed by subsection 402(a)(20) of the Dual Compensation Act of 1964, Public Law 88-448, approved August 19, 1964, 78 Stat. 494. The Dual Compensation Act of 1964 substituted other dual compensation restrictions which were codified in 5 U.S.C. § 5532.

The current dual compensation limitations of 5 U.S.C. § 5532 generally require that the reduction of retired pay of a retired service member holding full-time Federal civilian employment be computed on a pay period rather than an annual basis. See, generally, 44 Comp. Gen. 266 (1964), 47 *id.* 185 (1967), and 50 *id.* 604 (1971). Moreover, 5 U.S.C. § 5532(c)(2), quoted above, makes particular reference to "each reduction" required "for any pay period." Thus, the statute specifically provides a limitation on the amount to be received for any one pay period rather than for any given calendar or fiscal year. It is therefore our view that the current dual compensation provisions of 5 U.S.C. § 5532(c) do not permit

B-204119

retroactive payments at the end of a year to adjust the retired pay accounts of individuals from whom retired pay has been withheld in pay periods during the year.

The two questions presented are answered accordingly.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States